

COPY

Cross up in MS 1068

April 6, 1936

NEW HAMPSHIRE LAW LIBRARY

SEP 22 1998

CONCORD, N.H.

The Honorable Lane Dwinell
Governor of New Hampshire
Concord, New Hampshire

Dear Governor Dwinell:

You have referred to me with a request for advice as to decisions in Federal Courts, the position of an organization describing itself as CONSIT, being a committee of citizens of this state organized to oppose the Massachusetts income tax which by its terms reaches persons not resident in Massachusetts on income earned in Massachusetts.

This is not a novel situation however regrettable, unfortunate and economically burdensome to citizens who live in New Hampshire and work in Massachusetts. In Shafer v. Carter, 252 U.S. 36; 64 L. Ed. 445 (1919), the Supreme Court of the United States upheld an Oklahoma statute against the objection that it did precisely what the present Massachusetts law provides. In so ruling the Supreme Court said that it was very clear that a State had the power under the Constitution to do this.

"And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the state, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. This is consonant with numerous decisions of this court sustaining state taxation of credits due to nonresidents . . ." (Citations omitted). 252 U.S. at 52; 64 L. Ed. at 456.

On the same day another case decided by the United States Supreme Court held that the New York State income tax might lawfully be made applicable to residents of other states (New Jersey and Connecticut) with respect to income derived from operations, property or earnings in New York. In this particular case, however, a specific tax was held to be discriminatory and offensive to the privileges and immunities clause of the Federal Constitution because it allowed certain exemptions to residents which it did not allow to nonresidents. But in so holding the Court affirmed the validity of a nondiscriminatory tax. Travis v. Yale & Towne Manufacturing Co., 252 U.S. 60; 64 L. Ed. 460 (1919). Subsequent to these decisions a great number of federal and state cases have affirmed and recognized the right of a state to levy an income tax, or a tax measured by the net income received by a nonresident from property owned or business done within the taxing state. See annotation 75 L. Ed. 885; 15 A.L.R. 1326; 90 A.L.R. 484; 156 A.L.R. 1370.

"A state may tax such part of the income of a nonresident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers." International Harvester Co. v. Wisconsin Dept. of Taxn. (1944) 322 US 435, 88 L. ed 1373, 64 S Ct 1060."

I believe that more than half of the states of the Union have laws which tax nonresidents in one form or another. Massachusetts borders Rhode Island, Connecticut, New York, Vermont and New Hampshire. It is always possible for the Governor and Council to memorialize the Massachusetts General Court to repeal this legislation. However I would assume that this in turn would involve a formal examination of the tax laws of each of the other states which border on Massachusetts. For example, New York has such a tax and I assume Massachusetts residents having income from New York have to pay it.

At the time the bill to repeal this tax was scheduled for hearing before the Massachusetts General Court we discussed the question of possible appearance and objection and concluded that the net effect of such an appearance would have been contrary to the best prospect of success for the proposed repeal bill inasmuch as intervention by public officials of New Hampshire might have been taken as personally offensive by members of the committee hearing it.

COPY

April 6, 1956

- 3 -

The Honorable Lane Dwinell

Beyond memorializing the Massachusetts General Court I know of no way to eliminate the burdens of this Massachusetts tax. Any individual taxpayer faced with the Massachusetts tax, through private counsel, can challenge its constitutional validity, but as has been indicated above, it is not believed that such a challenge would be successful.

As has been previously advised by this office, it would not be constitutional for New Hampshire to pass legislation taxing citizens of another state on earnings in this state without also taxing citizens of this state in the same manner. Thus, any attempt to have the 1957 General Court invoke a doctrine of retaliation would necessarily involve legislative consideration of a tax of this type upon all of the citizens of this state.

The CONSIT petition is returned herewith.

Respectfully,

Louis C. Wyman
Attorney General

LCW/aml
Encl.